No. 10,065

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

JOHN KONG YEUNG,
Appellant,

vs.

TERRITORY OF HAWAII,
Appellee.

REPLY BRIEF OF JOHN KONG YEUNG.

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The Appellant's Opening Brief and the Appellee's Answering Brief clearly expose the head-on conflict on the sole issue to be decided in this case, to wit, whether the United States District Court for the Territory of Hawaii had the legal authority to take jurisdiction of the present indictment. The first question set forth on page 3 of the Answering Brief is not quite accurate. It should read: Does Section 86 of the Hawaiian Organic Act make 28 U.S.C.A. Sec. 76 applicable between the Territorial trial courts and the United States District Court for the Territory of Hawaii? The second question appears to be correct.

Appellee's anticipatory suggestion on page 7 of its brief that the Court will be "reminded" in this brief that the comment in *Hind v. Wilder's Steamship Co.,*

13 Haw. 174, 108 Fed. 113, 183 U. S. 545, 46 L. Ed. 321, on removal of causes is pure dictum does not deter us from emphatically so reminding the Court. Appellee's suggestion is nevertheless significant as an admission that neither this Court nor the United States Supreme Court has ever adjudicated the present issue. The conclusion reached by the District Court, based upon its confused reasoning in *Farm Corn v. Wardell,* 4 U. S. D. C. Haw. 605, has no more weight than the action of the same District Court in assuming jurisdiction in the present case. So, Appellee's abrupt conclusion that this Court "has ruled adversely to Appellant's contention" is clearly something less than true. (Answering Brief p. 7.)

It is equally inaccurate to argue, as has Appellee, that the United States Supreme Court did anything more in the *Wilder* case than to hold that under Sec. 86 of the Organic Act there was no appeal from the Supreme Court of the Territory of Hawaii to this Court. In fact, the Supreme Court in its opinion carefully confined its discussion to the appellate relationship between the courts of the Territory of Hawaii and the mainland United States courts. We have no hesitation in asserting that the present issue is an open one and that there is no case in the books that can be said to be in any way controlling.

We agree with Appellee that this Court "is at liberty to look to the general purpose and historical background" of a statute "for assistance in determining its proper meaning". (Answering Brief p. 8.) Surely this universal principle of statutory construc-

tion is as applicable to 28 U.S.C.A. Sec. 76 as it is to 48 U.S.C.A. Sec. 645. That very principle brings us to what we conceive to be the basic difficulty with Appellee's entire argument. That is, that the final result achieved by its reasoning is an absolute absurdity in the light of the historical function and purpose of 28 U.S.C.A. Sec. 76. The fallacy in Appellee's reasoning is well summed up in the following statement from pages 10-11 of its Answering Brief. "Since the general purpose of Congress was to place the Territorial courts in the same relationship to the Federal judicial system in which the state courts stood, it logically follows that Congress intended that each and every incident of that relationship, including the removal of causes, should also pertain between the Territorial and Federal judicial systems." There is nothing whatever in the original intent of Congress to limit appellate jurisdiction over Hawaii as in the case of states to justify the conclusion that it likewise intended to provide for removal from one court appointed and controlled by the President and Congress to another court appointed and controlled in exactly the same manner, both created under the authority of the same provision of the Federal Constitution. If, as the United States Supreme Court suggested in *In re Wilder's Steamship Co., supra,* Congress considered that "owing to the great distance of the Territory of Hawaii from the continent, the appellate jurisdiction over that territory should be more restricted than over other territories", is it likely that at the same time it intended to vest jurisdiction over terri-

torial criminal indictments in the District Court from which an appeal could be had as of right to this Court?

Basic to all of the conflicting rules of statutory construction called to the Court's attention in the two briefs already filed is the rule that statutes should be so construed as to effect reasonable and rational results rather than absurd and unreasonable ones.

Glover v. United States, 164 U. S. 294, 41 L. Ed. 440, 441.

We frankly do not understand Appellee's implication that the analysis of the historical function and purpose of 28 U.S.C.A. Sec. 76 in *Tennessee v. Davis,* 100 U. S. 257, 25 L. Ed. 648, is irrelevant because "Hawaii's calibre" is similar to that of "state law and local agencies". Appellee states "the discussion could be extended" (Answering Brief p. 24) and we wish it had because it seems obvious that Hawaii's status as an incorporated Territory is altogether different from that of a state. If there is anything that can be said about the Hawaii judiciary that is unanswerable, it is that the control of the President and Congress over it is absolute and complete. It is one of the fundamental facts of governmental organization in Hawaii, as any resident can testify. The same may be said, with equal truth, of the legislative and executive branches of the territorial government. There is no reason or justification for the existence of a "speedy remedy for the extrication of a Federal officer who has become entangled with state law and local agencies" in Hawaii. (Answering Brief p. 24.)

Appellee concedes that the word "state" in 28 U.S.C.A. Sec. 76 does not include "territory" and

accepts the conclusion reached in 13 *Opinions of the Attorney General* 584. (Answering Brief p. 22.) What Appellee has overlooked is that the very same line of reasoning which requires the foregoing statute to be so construed as to exclude territories leads to exactly the same result as to 48 U.S.C.A. Sec. 645. And that is, of course, that it is simply senseless to have removal between courts constituted in an identical manner.

We infer that Appellee has no quarrel with the reasoning of the United States Supreme Court in *Tennessee v. Davis, supra.* That being so, it cannot and in fact makes no attempt to meet our contention that the construction of 48 U.S.C.A. 645 which it urges upon this Court leads to an absurd situation. Appellee purports to sum up our argument on the point as "the proposition that it would be inadvisable to have the provisions of 28 U.S.C.A. 76 operative in the Territory of Hawaii". (Answering Brief p. 22.) That is, of course, not our contention at all but only a straw man which is very easily demolished. What we say is that to have 28 U.S.C.A. Sec. 76 operate in Hawaii completely defeats its historical purpose and function and that its operation there is utterly uncalled for, unnecessary and superfluous. This being so, this Court is by no means bound to so construe 48 U.S.C.A. 645 as to bring about this result but certainly has the power and right to place such a construction on the statute as will produce a reasonable and rational result. The question is not one of "advisability" but of how the statutes themselves should be construed.

> "One of the established rules for the construction of statutes is that they should have a rational, sensible construction, if their meaning is at all doubtful."
>
> 25 *R.C.L.* 1018.

We contend that to so construe 48 U.S.C.A. Sec. 645 as to make 28 U.S.C.A. Sec. 76 applicable in the Territory of Hawaii is utterly irrational and senseless. As we have already suggested, this can be avoided by construing the words "removal of causes" as meaning generally "the transfer from one court to another" by appeal, writ of error or other writ and by construing "courts of the United States" as meaning the constitutional mainland Federal courts.

The same result can be achieved in another way. 28 U.S.C.A. Sec. 76 is more than a mere removal statute. As we pointed out in our Opening Brief, it is clearly distinguishable from 28 U.S.C.A. Sec. 71 because it covers causes of which the District Court had no original jurisdiction. Thus while it is true that 28 U.S.C.A. Sec. 76 relates to the removal of causes, it also confers jurisdiction upon District Courts in criminal matters which they otherwise would not have. Construing 48 U.S.C.A. Sec. 645 and 28 U.S.C.A. Sec. 76 together, it is entirely logical to conclude that it was not the intent of Congress to include anything more than pure removal statutes such as 28 U.S.C.A. Sec. 71.

On page 23 of its Answering Brief, Appellee argues that "it is entirely aside from any point as well as incorrect for Appellant to urge that 28 U.S.C.A. 76

is a criminal statute and should be strictly construed". What Appellee overlooks is that this Court is necessarily confronted with the task of construing 48 U.S.C.A. Sec. 645 and 28 U.S.C.A. Sec. 76 together if it is going to arrive at an answer to the sole question presented by this appeal. 28 U.S.C.A. Sec. 76 is a criminal statute and it clearly begs the question to argue, as has Appellee, that the statute is remedial in character and should therefore be given a liberal construction. That it is remedial in states goes without saying but just the opposite is true in Hawaii. There is absolutely nothing in the territorial situation which requires or justifies or creates any place for any such remedy. The statute as applied to Hawaii would be an anomaly.

Appellee has obviously missed the point in connection with the contrast between Porto Rico and Hawaii. While it is true that the Justices of the Supreme Court of Porto Rico were appointed as are the judges of the Hawaii courts, the judges of the lower courts of Porto Rico were largely left under the control of the Governor, executive council and the local legislative assembly. *Sec. 33, Act April 12, 1900, c. 191, 31 Stat. 84.* There was therefore a logical reason for providing for removal from the Porto Rico trial courts to the District Court there. Just the opposite situation obtains in Hawaii. Here the trial judges are appointed in exactly the same manner as the Justices of the Porto Rico Supreme Court, the Supreme Court of the Territory of Hawaii and the judges of the United States District Court for the Territory of Hawaii. The Porto Rico trial courts

are thus local agencies in very much the same sense as state courts and there was a valid and logical reason why removal should be had and Congress doubtless so intended. There is therefore no validity in Appellee's conclusion that the policy of Congress in regard to Porto Rico "would justify a similar regulation for the Territory of Hawaii". (Answering Brief p. 24.)

Finally, assuming that to be true which we deny, namely that 48 U.S.C.A. Sec. 645 originally made 28 U.S.C.A. Sec. 76 operable in the Territory of Hawaii, we urge that the second sentence of the former statute has been wholly repealed by the various subsequent enactments cited in both the Opening and Answering Briefs. As the U. S. Supreme Court held in the *Wilder* case, 48 U.S.C.A. Sec. 645 set up a unique relationship for Hawaii by allowing an appeal from the Territorial Supreme Court to the United States Supreme Court but only in such cases as could be appealed from State Supreme Courts. That entire relationship has now been altered to allow appeals directly to this Court.

If, as Appellee contends, criminal cases such as this can be removed from the Circuit Courts of Hawaii to the District Court, we have a confusing situation in which the District Court and this Court too may be and virtually inevitably will be called upon to construe Territorial statutes which have not as yet even been ruled upon by the Supreme Court of Hawaii. The United States Supreme Court in the recent case of *Waialua Agricultural Co. v. Christian,* 305 U. S. 91, 83 L. Ed. 60, invoked the "manifest

error'' doctrine as to appeals from the Supreme Court of Hawaii to this Court. It would seem to be utterly inconsistent with this policy to allow removal from the Circuit Courts of Hawaii to the District Court. If removal were possible, the statutory law of Hawaii would of course govern in the District Court. Would this Court on appeal be bound by the ''manifest error'' doctrine as laid down in the *Waialua* case? Would the Supreme Court of Hawaii in another and subsequent case be bound by this Court's interpretation of Hawaii statutes? Or would the Hawaii Supreme Court in such a case be free to place its own construction on Hawaii statutes? The purpose of 28 U.S.C.A. Sec. 76 was to afford revenue officers a fair trial where such might conceivably be denied or impossible in state courts, not to introduce such an important element of uncertainty into the trial of criminal cases.

The second sentence of 48 U.S.C.A. Sec. 645 is completely without vitality. We can not agree that one phrase of the sentence can stand with the entire balance repealed. The sentence, taken as a whole, originally created a relationship between the Supreme Court of Hawaii and the U. S. Supreme Court which has ceased to exist.

CONCLUSION.

The operation of 28 U.S.C.A. Sec. 76 in Hawaii is not only ''inadvisable'' but also illogical and irra-

tional. We urge that this absurd result be avoided by any or all of the three avenues above outlined.

Dated, Honolulu, Hawaii,
August 10, 1942.

Respectfully submitted,
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